MOHD KAMARUZZAMAN MUSTAFFA v. AEROTREE DEFENCE & SERVICES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 22 NCVC-442-07-2013]
6 MARCH 2015

CIVIL PROCEDURE: *Stay of execution of judgment – Application for – Whether special circumstances existed to justify stay – Whether court should invoke inherent powers to prevent injustice or abuse of process of court – Rules of Court 2012, O. 92 r. 4*

On the day which was fixed for a full trial, the plaintiff and the defendants entered into a consent judgment ('the said consent judgment'). Subsequently, the defendant, *vide* a notice of application ('encl. 122') sought, *inter alia*, for a stay of the said consent judgment. The defendants contended that their former solicitors had acted beyond their authority when they agreed for the second and third defendants to issue personal undertakings to pay to the plaintiff the sum of RM1,400,000. Further, the defendants argued that they have filed another fresh suit in another court to set aside the said consent judgment. As such, the defendants argued that it was imperative that stay of execution of consent judgment was obtained so that the suit to set aside the consent judgment would not be an exercise of futility and rendered nugatory. The plaintiff, on the other hand, sought for an application pursuant to O. 92 r. 4 of the Rules of Court 2012 *vide* encl. 107 for orders, *inter alia*, that the second and third defendants comply with the terms of the consent judgement and to execute the written undertakings according to the consent judgment.

Held (dismissing application in encl. 122 and allowing application in encl. 107):

(1) The test for a stay of execution was to determine whether there were special circumstances to justify a stay. Section 73 of the Courts Judicature Act 1964 ('CJA') only applied to an appeal not operating as a stay. Since an appeal did not operate as a stay, then similarly there was no reason that a pending application to set aside a consent judgment should operate as a stay. Therefore, the defendant's pending application to set aside the consent judgment did not operate as an automatic stay of execution. (paras 5 & 9-10)

(2) When the consent judgment was recorded, the counsels for the defendants and the third defendant, were present in court and had the mandate to negotiate and confirm the terms of settlement for the consent judgment. Thus the defendant's counsel had never acted in excess of authority or mandate and there were no special circumstances that merited consideration of the court in order to grant a stay of execution. (paras 15 & 16)

(3) If the defendants had acted without authority of the defendants, in particular the second defendant, then the defendants' recourse would be against their counsel, but not to prejudice the plaintiff, or to entitle them to stay the execution of the consent judgment. Since part of the consent judgment had already been executed by the plaintiff, the defendants were estopped from applying for a stay of execution of the consent judgment. (paras 17 & 18)

(4) There was no justification for a stay of a judgment on a monetary sum. Even if the defendants were to succeed on setting aside the consent judgment, the defendants could still recover the monetary sum paid to the plaintiff. The defendants' argument that their setting aside application would be rendered nugatory should they succeed in their application could not be accepted and this ground was not a special circumstance to justify a stay of execution of the consent judgment. Since encl. 122 was not allowed, the defendants were required to comply with the terms of the consent judgment. As the defendants had failed to do so, it was imperative that they be ordered to comply with the same. (paras 20, 23, 26 & 29)

Case(s) referred to:

Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd [2013] 3 CLJ 47 CA ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 73

Rules of Court 2012, O. 92 r. 4

For the plaintiff - Wan Zafran Pawancheek (Pawancheek Marican with him); M/s Wan Marican Hamzah & Shaik

For the defendants - Raja Saidatul Akhma (Naqiuddin with her); M/s Lope Maizura

Reported by Sandra Gabriel

JUDGMENT

Yeoh Wee Siam J:

[1] This judgment is in respect of encls. 122 and 107.

Background Facts

[2] On 13 October 2014, ie, the day fixed for the full trial ('trial') of this suit, a consent judgment ('consent judgment') was recorded between the plaintiff and the defendants, before me, for the following orders:

(1) Defendan-Defendan akan membayar RM1,400,000.00 kepada Plaintiff secara sekaligus melalui cek jurubank ('banker's draft') pada atau sebelum 15.12.2014 sebagai penyelesaian penuh dan muktamad bagi kes guaman di sini;

(2) Plaintif akan mengembalikan kereta Mercedes Benz, dengan Model E-200K-W211(A) dan No Pendaftaran WSK 630, dalam keadaan yang baik (rosak rosot biasa dikecualikan) bersama dengan kunci, aksesori-aksesori, dan dokumen-dokumen relevan yang disimpan di dalam kereta, kepada Defendan Pertama pada atau sebelum 17.10.2014, di mana Plaintif mesti berbuat sedemikian melalui temujanji dan dengan memberi notis yang berpatutan, dan mesti menghantar kereta tersebut tanpa apa-apa liabiliti kenderaan/ pemandu (seperti saman atau denda trafik);

(3) Mana-mana pihak tidak akan mempunyai apa-apa tuntutan terhadap pihak yang satu lagi berkenaan tindakan guaman ini dan/ atau apa-apa perkara atau pertikaian antara pihak-pihak walau bagaimana berbangkit;

(4) Plaintif akan menandatangani surat akujanji, di mana beliau berakujanji untuk:

(a) memelihara kerahsiaan segala maklumat-maklumat, dokumen-dokumen, rekod-rekod dan bahan-bahan, pengetahuan teknikal, hak proprietari intelektual dan hal ehwal syarikat;

(b) tidak akan mendedahkan, atau menawarkan untuk mendedahkan, atau menyebarkan perkara yang sama kepada mana-mana pihak tanpa kebenaran bertulis Defendan-Defendan;

(5) Defendan Kedua akan menandatangani surat akujanji pada atau sebelum 07.11.2014, di mana beliau berakujanji untuk membayar secara peribadi jumlah RM1,400,000.00 sekiranya Defendan-Defendan tidak membayar jumlah secara sekaligus yang dirujuk di Perenggan 1 di atas pada tarikh tersebut;

(6) Defendan Ketiga akan menandatangani surat akujanji pada atau sebelum 17.10.2014, di mana beliau berakujanji untuk membayar secara peribadi jumlah RM1,400,000.00 sekiranya Defendan-Defendan tidak membayar jumlah secara sekaligus yang dirujuk di Perenggan 1 di atas pada tarikh tersebut;

(7) Pihak-pihak bebas untuk memohon; dan

(8) Pihak-pihak akan menanggung kos masing-masing.

Enclosure 122

[3] This is the defendants' amended notice of application, *inter alia*, for a stay of the consent judgment dated 13 October 2014, and for costs to be in the cause.

Court's Decision Given On 25 February 2015 Regarding Encl. 122

[4] The application of the defendants is dismissed. Costs of RM3,000 are to be paid by the defendants jointly to the plaintiff.

A *Grounds Of Decision For Encl. 122*

[5] The test on whether to grant a stay of execution is to determine whether there are special circumstances to justify a stay.

[6] In *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur*
B *Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257 the Federal Court, *inter alia*, stated as follows:

> At Held [2]:
>
> There are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if the stay was referred
C is the most common one.
>
> At p. 267:
>
> *Halsbury's Law of England* (4th Ed) Vol 17 at para 455 cites the following authorities as examples of special circumstances: **that an appeal would be nugatory if stay was refused** …
D
> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstances is the genus of which nugatoriness is a species. If it has been shown that
E an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established.
> (emphasis added)

(See also *Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd* [2013] 3 CLJ 47).

F **[7]** The defendant's grounds for the application have been summarised by learned counsel for the defendants as follows:

> The Defendants' former solicitors, Messrs Jacob Goldie SS Chew had acted beyond their authority when they agreed for D2 and D3 to issue their personal undertakings to pay to the Plaintiff the sum of RM1,400,000.
G
> The Consent Judgment is highly prejudicial to D2 and D3 as the cause of action if any was based on the purported agreement between D1 and the Plaintiff. The implication of the consent judgment is that D2 and D3 are now made personally liable for a debt owing by D1, ie, the company (which is strictly denied).
H
> The Defendants' former solicitors were also reluctant to continue with the conduct of the matter and urged the Defendants to find another firm of solicitors to take over conduct of the matter.
>
> The Defendants have now filed a fresh suit in another Court (KLHC2NCVC-575-12/2014) to set aside the said consent judgment.
I
> In the premises it is imperative that stay of execution of the consent judgment is obtained so that the other suit to set aside the consent judgment will not be an exercise in futility and rendered nugatory.

[8] Section 73 of the Courts of Judicature Act 1964 ('CJA') provides as follows:

> Appeal not to operate as stay of execution
>
> 73. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

[9] Section 73 of the CJA only applies to an appeal not operating as a stay. Since an appeal does not operate as a stay, then similarly there is no reason why a pending application to set aside a consent judgment should not operate as a stay. In my opinion, the same principle in s. 73 of the CJA should also apply to an application to set aside a consent judgment, as in this case.

[10] I am therefore of the view that the defendants' pending application to set aside the consent judgment does not operate as an automatic stay of execution.

[11] I am fully conversant with the background facts of this case. Before the trial, the second defendant had applied for a postponement on the ground that he would be overseas. I did not allow the postponement because both parties were informed during the last case management on 7 October 2014 that there would not be a postponement of the case. Thus, on the day of the trial on 13 October 2014, the defendants knew that the trial would proceed even in the absence of the second defendant.

[12] Just before the trial commenced, both learned counsels saw me in chambers and informed me that they would attempt to reach an amicable settlement after consulting their clients.

[13] As submitted by learned counsel for the plaintiff, the negotiations for settlement on 13 October 2014 took the whole morning. Both learned counsels came to see me in chambers at every stage of the negotiations to update me on their progress and asked for more time from the court in order to achieve a settlement. Throughout that period, learned counsel for the defendants informed me that he had the mandate to facilitate the settlement and the terms thereof even though the second defendant was absent. He informed the court that the third defendant was present in court and she was in communication with the second defendant and she had confirmed that all the third defendants agreed to the terms of settlement.

[14] I agree with the following submissions of learned counsel for the plaintiff:

> Defendants were aware of the consent judgment's terms, and gave counsel mandate
>
> 5.1. The Plaintiff submits that the Defendants were fully aware, and had agreed to, the terms of the Consent Judgment. They were also fully aware of their instructions to counsel:

(a) Negotiations were prolonged - on 13.10.2014, the first day of trial, parties continued to negotiate terms without rest from 8.30 am until they were able to enter consent judgment circa 12.30 pm;

(b) Negotiations were extensive, and parties were continuously advised and aware of changes to terms - counsel for parties (Jacob Goldie, Wan Zafran Pawancheek and Md Yunos Shariff) repeatedly took instructions, helped negotiate terms, advised parties, and returned several times to the learned judge (who waited in chambers) with updates on their latest settlement instructions/efforts;

(c) All parties were present to directly give instructions to counsel:

(i) the Plaintiff came to court with his family, while the 3rd Defendant came to court with her assistant and remained in visible/audible contact with the 2nd Defendant by mobile telephone throughout negotiations;

(ii) on at least three (3) occasions, the 3rd Defendant and her counsel relegated themselves to the court corridor to discuss terms with the 2nd Defendant by mobile telephone, and each time thereafter Defendants' counsel would meet again with Plaintiff's counsel to discuss the newly revised/amended terms;

(d) The 2nd Defendant was fully consulted - Defendant's counsel had explicitly stated, "… my client is discussing the settlement with Dato' Halim" (ie, the 2nd Defendant);

(e) The draft Consent Judgment was produced with the effort of counsel and parties:

(i) both Plaintiff's and Defendants' counsel typed and amended the draft Consent Judgment together, on a laptop, by the court corridor and inside court, as witnessed by the Plaintiff and the 3rd Defendant;

(ii) the court interpreter assisted by printing copies of the draft Consent Judgment for counsel's further revision and amendments, and each time thereafter counsel would return to parties to discuss the revised/amended terms further, and this was done at least twice; and

(iii) it was only after all parties, including the 2nd Defendant, had agreed to the written terms that parties' counsel finally returned to the learned judge in chambers to record the Consent Judgment.

5.2 Thus, by the above, Defendants' counsel had never acted in excess of authority or his mandate. The Defendants' allegation that he had done so is untrue.

[15] In the light of the true facts of the situation when the consent judgment was recorded, I am of the firm belief that learned counsel for the defendants and the third defendant, who was present in court, had the mandate to negotiate and confirm the terms of settlement for the consent judgment.

[16] The application by the defendants to set aside the consent judgment is clearly an afterthought. There are no special circumstances that merit consideration by this court in order to grant a stay of execution.

[17] It is to be noted that if indeed learned counsel for the defendants had acted without the authority of the defendants, in particular the second defendant, then the defendants' recourse would be against their counsel, but not to prejudice the plaintiff, or to entitle them to stay the execution of the consent judgment.

[18] The evidence shows that part of the consent judgment has already been executed. The plaintiff has complied with para. (2) when he delivered the Mercedes Benz to the defendants on 17 October 2014. The defendants have accepted the vehicle through their representative, Tun Zirawatul Akmal ('TZA'). It is a poor excuse for the defendants to now allege that TZA had accepted the vehicle without knowledge of the consent judgment because the vehicle is registered under the first defendant's name. Since part of the consent judgment has already been executed by the plaintiff, it follows that the defendants are now estopped from applying for a stay of execution of the consent judgment.

[19] As for the remaining terms of the consent judgment, they are regarding payment of a monetary sum, and the second and third defendants' respective undertakings to pay the monetary sum.

[20] Pursuant to para. (1) of the consent judgment, the date for the defendants to pay the sum of RM1,400,000, ie, 15 December 2014, is already over. Therefore this term in para. (1) cannot be stayed. The plaintiff can in fact commence committal proceedings against the defendants for non-compliance with this term. Notwithstanding that, it is trite law that there is no justification for stay of a judgment on a monetary sum. Even if the defendants were to succeed later on in setting aside the consent judgment and after all the appeal proceedings are over, at the end of the day, the defendants, if they do have a valid claim, can always recover any monetary sum paid to the plaintiff. There is no evidence adduced by the defendants that the plaintiff would be unable to pay back any sum received to the defendants. Therefore, the defendants' argument that their setting aside application would be rendered nugatory should they succeed in their application cannot be accepted.

[21] As for paras. (5) and (6) of the consent judgment, the dates for the second and third defendants to sign their respective undertakings, ie, 7 November 2014 and 17 October 2014, are already over. Therefore, logically there is nothing left here to be stayed.

[22] It must be noted at all times that the consent judgment was entered into voluntarily by both parties and it should be honoured. Therefore, there is no merit to this application.

[23] It is my finding that there are no special circumstances to justify a stay of execution of the consent judgment. I therefore ordered accordingly for encl. 122.

Enclosure 107

[24] This is the plaintiff's application made under O. 92 r. 4 of the Rules of Court 2012 for the following orders:

1. Berkenaan Penghakiman Persetujuan bertarikh 13.10.2014 dalam prosiding ini ("Penghakiman Persetujuan"):

   (a) arahan-arahan untuk Defendan Kedua mengemukakan surat akujanji yang ditandatangani olehnya (yang dirujuk di Perenggan 5, Penghakiman Persetujuan) kepada Mahkamah dan menyampaikannya kepada Plaintif dengan serta-merta;

   (b) arahan-arahan untuk Defendan Ketiga mengemukakan surat akujanji yang ditandatangani olehnya (yang dirujuk di Perenggan 6, Penghakiman Persetujuan) kepada Mahkamah dan menyampaikannya kepada Plaintif dengan serta-merta;

2. Bahawa semua arahan selanjutnya dan yang diperlukan boleh diberikan;

3. Bahawa peruntukan boleh dibuat bagi kos permohonan ini; dan

4. Lain-lain relif atau perintah selanjutnya yang dianggap sesuai dan patut.

Court's Decision Given On 25 February 2015 Regarding Encl. 107

[25] The application of the plaintiff is allowed. The second and third defendants are respectively ordered to give their written undertaking as prayed within seven days from the date of this order. Costs of RM3,000 are to be paid by the second and third defendants jointly to the plaintiff.

Grounds Of Decision For Encl. 107

[26] In view of my earlier decision not to allow the defendants' application in encl. 122 for stay of execution, accordingly, the defendants are required to comply with the terms of the consent judgment. Since the defendants have failed to do so, it is now imperative that they be ordered to comply with the same.

[27] It is clear from paras. (5) and (6) of the consent judgment that the second and third defendants have consented to execute their written undertakings respectively on/before 7 November 2014 and 17 October 2014, as the case may be.

[28] It is noted that there is no provision or term in the consent judgment that the second and third defendants are to serve their respective undertakings to the plaintiff, but it is implicit that they should do that accordingly.

[29] Since the second and third defendants have not complied with the terms of the consent judgment, this court now gives them another opportunity to do so and orders them to comply with their obligations thereunder by the new deadline given, ie, seven days from the date of this order, failing which the plaintiff is at liberty to commence the relevant proceedings.

[30] For the above reasons, I therefore ordered accordingly for encl. 107.